Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

BARBARA HAINES,

Petitioner,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a veteran's cause of action based on a claim of clear and unmistakable error survives the veteran's death.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is published as 154 F.3d 1298 (Fed.Cir. 1998) and reprinted in the Appendix ("App.") at App. 1. The opinion of the Court of Veterans Appeals in *Haines v. West* is published at 10 Vet.App. 446 (1997) and reprinted at App. 2.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on August 24, 1998.

PROVISIONS INVOLVED

38 U.S.C. § 5109A. Revision of decisions on grounds of clear and unmistakable error.

> (a) A decision by the Secretary under this chapter is subject to revision on grounds of clear and unmistakable error. If evidence establishes the error, the decision shall be reversed and revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after the decision is made.

(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

38 U.S.C. § 7104(a).

(a) All questions in a matter which under Section 211(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. The Board shall decide any such appeal only after affording the claimant an opportunity for a hearing. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

38 C.F.R. § 3.105(a).

Error. Previous Determinations which are final and fining, including decisions of service connection, degree of disability, age, marriage,

> relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision. Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provisions of Sec. 3.500(b)(2) will apply.

38 C.F.R. § 20.1302 (Prior to October 23, 1997).

> When an appeal is pending before the Board of Veterans' Appeals at the time of the appellant's death, the Board may complete its action on the issues properly before it without application from the survivors.

38 C.F.R. § 20.1302 (Effective October 23, 1997).

> Death of the appellant during pendency of appeal. An appeal pending before the Board of Veterans' Appeals when the appellant dies will be dismissed.

STATEMENT OF THE CASE

1. Veterans initiate claims for benefits by filing a claim at the nearest Regional Office. *See*, 38 U.S.C. § 5101-5103. Upon the veteran's request, the Regional

Office must hold a hearing where the hearing officer assists the veteran in developing his claim. After the hearing, or in the event no hearing is requested, the Regional Office issues a written decision informing the veteran of the claim's outcome, stating the reasons for the decision and the rights of the veteran in the case his claim is denied. 38 C.F.R. § 3.103(f). In cases where the claim is denied, the veteran is required to file a Notice of Disagreement (NOD) to initiate the process of appellate review. 38 U.S.C. § 715(a).

A filing of the NOD precipitates a re-examination of the claim by the Regional Office. 38 U.S.C. § 7105(d)(1). If a re-examination of the claim does not result in an agreement between the veteran and Regional Office, the veteran must then prepare a Statement of the Case to present to the Board of Veteran Appeals ("BVA"). 38 U.S.C. § 7105(d)(1)(A-C). The Statement of the Case contains a summary of the evidence and factual issues, a statement of the applicable statutes and regulations and a discussion of their application to the facts. *Id.* The Statement of the Case also sets out the Regional Office's determinations on each of the issues that were decided adversely to the veteran. *Id.* The veteran selects the issues that he wishes to appeal to the BVA and lists the arguments relating to the errors of fact or law made by the Regional Office. *Id.*

The BVA is required to consider all the veteran's arguments and to liberally construe those arguments in determining whether the veteran has raised any appealable issues. 38 C.F.R. § 20.202. The BVA's decisions are written statements containing the BVA's findings and conclusions and the reasons and bases for those findings

and conclusions. 38 U.S.C. § 7104(d)(1). Finally, a BVA decision must inform the veteran of his right to appeal to the Court of Veteran Appeals ("CVA").

2. The phrase "clear and unmistakable error" derives from a series of Department of Veteran Administration ("Department") regulations, promulgated prior to the Judicial Review Act. Specifically, 38 C.F.R. § 3.105(a) provides that previous dispositions of an action will be considered correct absent a showing of "clear and unmistakable error."

In defining clear and unmistakable error ("CUE"), the CVA has held that the Department's violation of one of its own regulations is clear and unmistakable error. *See, Thomson v. Derwinski,* 1 Vet.App. 251 (1991). The CVA has further defined CUE as "an administrative failure to apply the correct statutory and regulatory provisions to the correct and relevant facts." *See, Oppenheimer v. Derwinski,* 1 Vet.App. 370 (1991). Further, in *Look v. Derwinski,* 2 Vet.App. 157, 163 (1992), the CVA concluded that "[t]he substantive rights of the veteran have been prejudiced by the Government's failure to apply [the statute] properly and thus, this misapplication of the law constitutes clear and unmistakable error committed by the VA."

The CVA's decisions clearly indicate that the main purpose of a CUE claim is to ensure that the veteran receives a full and complete adjudication of his benefit claim which includes the application of all relevant regulations and statutes. A claim of CUE requires demonstration of noncompliance with mandatory statutory or regulatory requirements. The assertion of a claim of CUE does not result in an award of benefits but merely a right

to readjudication, applying the correct legal standards. Claims of CUE are directed at the validity of claim adjudication and not the end result. It is in the nature of a collateral attack in the prior adjudication.

A CUE determination is a predicate finding which is required by statute and/or regulation in order to vacate the prior determination. Such a proceeding is in the nature of a collateral attack on a final judgment. In the prosecution of a CUE claim, the veteran must demonstrate that clear and unmistakable error was made in the prior determination. Therefore, procedurally, a predicate finding of CUE must be made in order to vacate the prior determination. Once the prior determination is vacated it must be readjudicated applying the correct facts and/or the correct statutes and regulations.

In 1997, Congress acknowledged the importance of a veteran's right to collaterally attack prior final BVA decisions, as well as Regional Office determinations. Accordingly, the legislature enacted 38 U.S.C. § 5109A. In *Dittrich v. West*, 11 Vet. App. 10 at 11, the CVA, in discussing § 5109A provided: "This act codifies 38 C.F.R. § 3.105(a) and, abrogating *Smith*, in part, makes BVA decisions subject to revision by the BVA based on CUE. Judicial review of a BVA decision denying a claim of CUE in an earlier BVA decision would then be available." Based upon *Smith*, BVA decisions had been considered final and not subject to CUE review. Accordingly, § 5109A creates another safeguard for the veteran in ensuring that the Department is accountable for providing the veteran a full, complete and correct adjudication of his claim for benefits.

3. Barbara Haines was married to the late Victor E. Haines. Prior to his death, Mr. Haines initiated a claim of CUE at the Department of Veterans Affairs' Regional Office. After the Regional Office denied Mr. Haines' claim, he perfected an appeal to the Board of Veterans' Appeals ("BVA"). While the claim was pending, Mr. Haines died. The BVA dismissed the claim due to Mr. Haines' death. The BVA cited 38 U.S.C. § 7104(a) and 38 C.F.R. § 20.1302 as authority for its decision to dismiss Mr. Haines' CUE claim.

Barbara Haines, as the heir at law of Mr. Haines, filed a Notice of Appeal with the Court of Veteran Appeals on April 18, 1997. On June 20, 1997, counsel for the Secretary informed the Court of Veteran Appeals that no BVA decision existed regarding the appellant, Barbara Haines. On July 3, 1997, appellant's counsel responded by attaching the December 23, 1996 order dismissing Mr. Haines' appeal because of his death.

In a September 15, 1997 order, the Court of Veteran Appeals dismissed the claim of the appellant for lack of jurisdiction on the grounds that the appellant's claim did not constitute a judiciable controversy.

Ms. Haines appealed to the Federal Circuit on the issue of whether an action based on a claim of CUE survives a veteran's death. The Federal Circuit, in interpreting 38 U.S.C. § 5109A, determined that only a claimant can seek correction of a prior erroneous decision. The Federal Circuit further found that § 5109A provides no procedure for adjudication or payment of veterans benefits to survivors.

REASONS FOR GRANTING THE WRIT

The Federal Circuit's opinion completely undermines the fundamental underpinnings of the entire Veterans Judicial Review Act and allows the Department of Veteran Affairs to return to its period of "splendid isolation" in cases where an action based upon a claim of CUE has been brought by a claimant who subsequently is no longer able to pursue the action because of his death.

Citing 38 C.F.R. § 20.1302 and 38 U.S.C. § 7104(a), the BVA dismissed Mr. Haines' CUE claim claiming that it "lacked jurisdiction" because Mr. Haines died while his appeal was pending. The Federal Circuit denied Mr. Haines' survivor, Ms. Haines, her right to proceed on the basis that a CUE claim was a claim for "accrued benefits" citing *Landicho v. Brown*, 7 Vet.App. 42 (1994) and *Zevalkink v. Brown*, 102 F.3d 1236 (Fed. Cir. 1996), *cert. denied*, 117 S.Ct. 2478 (1997). Ms. Haines asserts that her husband's CUE claim survives his death and that Mr. Haines was entitled to an adjudication of his CUE claim notwithstanding his death.

Ms. Haines first asserts that the very nature of a CUE claim mandates its survival. The CVA and Department attempted to defend the dismissal of the CUE claim by contending that once Mr. Haines died, any clear and unmistakable error present in the Department's determination also died. Such a contention, as adopted by the Federal Circuit, is at complete odds with the entire purpose of the Veteran's Judicial Review Act.

In *Brown v. Gardner*, 513 U.S. 115 (1994), the Court, in holding that any interpretive doubt is to be resolved in the veteran's favor, recognized that the Department had

been completely free from judicial review for far too long. *Id.* at 121. In addition, *Hodge v. West*, 1998 WL 635515 (Fed. Cir.) recognizes that in creating judicial review of Department decisions, Congress intended to preserve the pro-claimant system. The court in *Hodge* also stressed the importance of systemic fairness in the benefits determinations process. Thus, it is clear that the survival of a veteran's claim of CUE is integral to the protection of the pro-claimant scheme and the need to maintain systemic fairness in the benefits determination process.

Therefore, to claim that any clear and unmistakable error in the Department's decision dies with the claimant clearly contravenes Congressional intent. If Congress had intended that claims would not survive the veteran's death, Congress would have stated so, but it did not. The Department's decision may still contain clear and unmistakable error regardless of the Claimant's death. To permit an erroneous determination to stand subverts systemic fairness, thereby undermining the credibility and reliability of the entire adjudication process. Such a result allows the Department to maintain its "splendid isolation" and escape any accountability for its failure to adhere to its own rules and regulations.

Ms. Haines secondly asserts that a CUE claim is a "remedial claim" and not an "accrued benefit" or "survivor claim." A CUE claim is a remedial action and serves as a collateral attack on a previous and final decision. *See, Smith v. Brown*, 35 F.3d 1516, 1527 (Fed. Cir. 1994). A remedial action is one that compensates an individual for a specific harm suffered. *See, Matter of Wood*, 643 F.2d 188, 190-191 (5th Cir. 1980). When the statute fails to address the survivability of a claim, the courts must look to

federal common law. *See, United States v. NEC Corporation*, 11 F.3d 136, 137 (11th Cir. 1994). It is well settled federal common law that remedial actions survive the death of a plaintiff while penal actions do not. *See, Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884).

The Federal Circuit Court determined that a veteran's heir may not pursue the veteran's CUE claim because a survivor "may not pursue disability compensation claims of a veteran, even as heir to the veteran's estate." *Haines*, 154 F.3d at 1300. Such a determination fails to recognize the nature of a CUE claim. A CUE claim is not a claim for compensation. Rather, it is a collateral attack, seeking to correct clear and unmistakable error in a prior Department determination. Such a collateral attack does not result in the granting of benefits, it results in a readjudication of the defective prior determination. As such, the collateral attack is not a compensation claim, but an action to remediate a prior error. Survivors merely seek to maintain their decedent's right to have the matter decided in conformance with the applicable rules and regulations. Such a right does not seek compensation, it seeks the correction of prior error.

Therefore, because the Federal Circuit Court incorrectly characterizes a 38 U.S.C. § 5109A action as a compensation claim, the Federal Circuit Court's determination that such an action can not survive the claimant's death is clearly erroneous and should be vacated.

However, even though the Federal Circuit's opinion completely misunderstands the basic purpose and nature of CUE claims and that the basic purpose and nature of a CUE claim mandates its survival of the claimant's death,

dismissal of Mr. Haines' CUE claim was still improper. The CVA dismissed Ms. Haines' CUE claim, and the Federal Circuit affirmed the dismissal, on the basis of an interpretation of 38 U.S.C. § 5121. This analysis is flawed because it does not address 38 U.S.C. §§ 5109A or 7104(a) and 38 C.F.R. §§ 3.105, 20.1302 and 20.611.

As stated, *supra*, 38 U.S.C. § 5109A allows a claimant to request a revision of a Secretary's decision based on CUE at any time after that decision is made. In the present case, the claimant, Victor Haines, made such a request. In fact, Victor Haines made a request at the Regional Office and once turned down, appealed that decision based on CUE to the BVA. Accordingly, Victor Haines met the requirements of the statute prior to his death. The BVA dismissed Mr. Haines' claim, citing both 38 U.S.C. § 7104(a) and 38 C.F.R. § 20.1302 as authority for dismissing the claim.

38 U.S.C. § 7104(a) provides:

> All questions in a matter which under section 211(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. The Board **shall** decide any such appeal only after affording the claimant an opportunity for a hearing. Decision of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

(emphasis added). The BVA misinterpreted 38 U.S.C. § 7104(a) in citing it as authority for the dismissal of Mr. Haines' CUE claim. The plain language of the statute

clearly provides that the BVA must issue a final decision on a matter under § 211(a) (now 38 U.S.C. § 511(a)) once that matter is appealed. This provision has been authoritatively construed by the Federal Circuit as **"requiring** that the Board render a decision on any question 'under a law that affects the provision of benefits by the Secretary to veterans', 38 U.S.C. § 511(a), where a Regional Office has decided that question." *Donovan v. West*, 1998 WL 697228 (Vet.App.) citing, *Cox v. West*, 149 F.3d 1360, 1365 (Fed. Cir. 1998). The BVA, as well as the CVA and Federal Circuit by their affirmance of the BVA's decision, clearly misinterpreted this statute by allowing the BVA to elude its statutory requirement to decide all questions under the law of 38 U.S.C. § 511(a).

The BVA also cited to 38 C.F.R. § 20.1302 as authority to dismiss Mr. Haines' CUE claim. At the time of the BVA's dismissal of Mr. Haines' CUE claim, 38 C.F.R. § 20.1302 provided:

> When an appeal is pending before the Board of Veterans' Appeals at the time of the appellant's death, the Board may complete its action on the issues properly before it without application from the survivors.

As stated, *supra*, Ms. Haines appealed the BVA's decision to the CVA and the CVA dismissed Ms. Haines' appeal on September 15, 1997. 38 C.F.R. § 20.1302, as cited above, was still in full force and effect. However, in between the time the CVA dismissed Ms. Haines' CUE claim and Ms. Haines' appeal to the Federal Circuit, 38 C.F.R. § 20.1302 was amended to provide:

> Death of the appellant during pendency of appeal. An appeal pending before the Board of

> Veterans' Appeals when the appellant dies will be dismissed.

This amendment was effective October 23, 1997. The amendment cites 38 U.S.C. § 7104(a) as authority. This amendment to the regulation is significant for two reasons.

First, when a regulation changes after a claim has been filed but before the judicial appeal process has been concluded, the version most favorable to the appellant will apply unless Congress has specifically provided otherwise. *See, Anglin v. West*, 11 Vet.App. 361 (1998); *Karnas v. Derwinski*, 1 Vet.App. 308, 312 (1991).

In the present case, the pre-amendment version of 38 C.F.R. § 20.1302 must apply because it clearly favors both Mr. Haines and the Appellant. The pre-amendment regulation provides that when an appeal is pending, the BVA is to complete its action on the issue properly before it. *See, Cates v. Brown*, 5 Vet.App. 399, 399 (1993). Further, the effect of that regulation is "to allow the claim to survive the claimant's death, and permit the Board to proceed to adjudicate the merits of the claim without a claimant." *Smith v. Brown*, 10 Vet.App. 330, 335 (1997).[1]

---

[1] Based upon the flawed reasoning of both *Landicho* and *Zevalkink*, the CVA ultimately determined in *Smith*, that 38 C.F.R. §§ 20.611 and 20.1302 were invalid. As discussed *infra*, neither the CVA nor Federal Circuit have authority to change the Secretary's interpretation of a statute based upon case law holding. As such, the ultimate holding in *Smith* is contrary to law and should be deemed *void ab initio*.

Therefore, the regulation, as it existed prior to amendment, is controlling in the present case and clearly provides that the veteran's CUE claim survives his death.

Second, the Secretary was under a duty to notify the Court of the regulation's amendment. In *Camphor v. Brown*, 8 Vet.App. 272, 276 (1995), the CVA held that the government acted unreasonably when the Secretary failed in its duty to notify the court of a change in a law that was pertinent and significant authority in the case under consideration on appeal. Further, it is well established that the Secretary has a duty to inform the Court of the law applicable in each appeal before it. *See, Penny v. Brown*, 7 Vet.App. 348 (1995). The Secretary has an ethical obligation under both the *Model Rules of Professional Conduct for Federal Lawyers* (Rule 3.3) and the ABA's *Model Rules of Professional Conduct* (Rule 3.3) to apprise the Court of any applicable law in any case that comes before the Court. *See, Curtis v. Brown*, 8 Vet.App. 104 (1995).

Clearly the failure of the Secretary, the General Counsel and the Department of Justice to notify the CVA and/or the Federal Circuit of the regulation's amendment is a clear breach of their ethical and legal duty. Furthermore, this failure deprived Ms. Haines of the benefit of the original regulation in effect at the time of the BVA's dismissal. That benefit clearly permitted Mr. Haines' CUE claim to survive his death.

Finally, the CVA's analysis in *Landicho, supra*, and the Federal Circuit's analysis in *Zevalkink, supra*, is flawed because both cases interpret 38 U.S.C. § 5121 without considering § 7104(a) which the Secretary had already dispositively interpreted in 38 C.F.R. § 20.1302 and 38

C.F.R. § 20.611. Pursuant to *Chevron v. U.S.A., Inc. v. Natural Resources Defense, Inc.*, 467 U.S. 837 (1984), both the CVA and Federal Circuit are required to defer to the Agency's interpretation of the statute and not create their own. Therefore, the Secretary's interpretation of 38 U.S.C. § 7104(a) as promulgated in 38 C.F.R. §§ 20.611 and 20.1302 prior to the *Smith v. Brown, supra*, amendments is controlling and should have been given deference.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
for the Federal Circuit

98-7014

BARBARA HAINES,

Claimant-Appellant,

v.

TOGO D. WEST, JR., Secretary of Veterans Affairs,

Respondent-Appellee.

DECIDED: August 24, 1998

Kenneth M. Carpenter, Carpenter, Chartered, of Topeka, Kansas, argued for claimant-appellant.

Leslie Cayer Ohta, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for respondent-appellee. With her on the brief were *Frank W. Hunger,* Assistant Attorney General, *David M. Cohen,* Director, and *Bryant G. Snee,* Assistant Director. Of counsel on the brief were *Richard J. Hipolit,* Deputy Assistant General Counsel, and *Nicole Sideris,* Staff Attorney, U.S. Department of Veterans Affairs, of Washington, D.C.

Appealed from: United States Court of Veterans Appeals

Before RICH, LOURIE and BRYSON, *Circuit Judges*.

LOURIE, *Circuit Judge*.

Barbara Haines appeals from the decision of the United States Court of Veterans Appeals dismissing her appeal for lack of jurisdiction. *Haines v. Gober*, 10 Vet. App. 446 (1997). Because the Court of Veterans Appeals did not err in determining that a widow may not pursue her deceased husband's claim that the agency committed clear and unmistakable error (CUE) under 38 U.S.C.A. § 5109A (West Supp. 1998), Pub. L. No. 105-111, § 1(a)(1), 111 Stat. 2271, 2271 (1997), we affirm.

BACKGROUND

Haines's deceased husband, a veteran, challenged the termination of his total disability benefits. The regional office of the Department of Veterans Affairs denied his claim for benefits and he appealed to the Board of Veterans' Appeals, asserting that the agency committed clear and unmistakable error in its determination. The veteran subsequently died and the Board dismissed the appeal because of the veteran's death, without rendering a decision on the merits of the veteran's claim.

Haines then filed a notice of appeal to the Court of Veterans Appeals challenging the Board's dismissal of her deceased husband's appeal. The court dismissed the appeal for lack of jurisdiction, stating that "a CUE adjudication with respect to the appellant's deceased husband would not involve a case or controversy with respect to the appellant, but rather an advisory opinion not capable of providing any relief to the appellant." The court's

determination was premised on its conclusion that the veteran's interest in his CUE claim terminated at the time of his death and that Haines is statutorily precluded from pursuing her deceased husband's claim as heir to his estate.

DISCUSSION

Our jurisdiction over cases from the Court of Veterans Appeals is limited. We may only "review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c) (1994).

In this appeal, Haines challenges the Court of Veterans Appeals' ruling that a CUE claim under section 5109A alleging clear and unmistakable error in a disability compensation determination does not survive a claimant's death. Since this issue clearly relates to the interpretation of a statute, we have jurisdiction over this appeal. Because statutory interpretation is a question of law, we review the question without formal deference to the decision of the Court of Veterans Appeals.

Haines provides two arguments in support of her position that her husband's claim survived his death. First, Haines relies on the language of subsection (d), which states that a CUE claim may be made "at any time." Second, she argues that claims based on remedial statutes typically survive the death of the party asserting the claim. Neither of these arguments is persuasive.

Section 5109A provides as follows:

> (a) A decision of the Secretary under this chapter is subject to revision on the grounds [sic] of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.
>
> (b) For the purposes of authorizing benefits, a [decision] on the grounds [sic] of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.
>
> (c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.
>
> (d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.
>
> (e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

This statute makes clear that a CUE claim is not a conventional appeal, but rather is a request for revision of a decision by the Secretary. It is thus a means for correction of a clearly and unmistakably wrong decision, compared with an appeal to the Board, which permits review of decisions that, while in error, do not meet the clear and unmistakable tests. The parameters of a clear and unmistakable error have not yet been fully fleshed out by the agency or the courts, and this case does not require us to do so. Nonetheless, it is apparent that a

clear and unmistakable error is one that, while fundamental to the correctness of the adjudication of a claim, is one about which reasonable minds could not differ. *See, e.g., Russell v. Principi*, 3 Vet. App. 310 (1992) (en banc) (interpreting the regulation that preceded the enactment of the statute). Such an error is plainly not the usual fare of disputes concerning entitlement to benefits.

The substantive disability compensation provisions concerning which the veteran had asserted a CUE claim in this case are found in chapter 11 of Title 38 of the United States Code. Chapter 11 provides for disability benefits payable to qualifying veterans and provides death benefits to qualifying survivors. *See, e.g.*, 38 U.S.C. § 1110 (1994) (providing for basic disability entitlement to veterans); *id.* § 1121 (providing basic death benefit entitlement to qualifying survivors). The statute draws a distinction between disability compensation, generally payable only to veterans, and death and pension benefits, payable to survivors. By statute, a veteran's entitlement to payment of disability compensation terminates on the last day of the month preceding the veteran's death. *See* 38 U.S.C. § 5112(b) (1994). Accordingly, survivors may not pursue disability compensation claims of a veteran, even as heirs to the veteran's estate. *See, e.g., Landicho v. Brown*, 7 Vet. App. 42, 53-54 (1994) (interpreting section 5112(b)).

Certain survivors, however, have a right to seek payment of accrued benefits owed to a veteran at the time of the veteran's death. *See* 38 U.S.C.A. § 5121 (West Supp. 1998), Pub. L. No. 104-275, § 507, 110 Stat. 3343 (1996). Nonetheless, this accrued benefits provision is limited. A survivor may only seek payment of those benefits which

were "due and unpaid" at the time of the veteran's death. *Id.* § 5121(a). The statute also limits payment to those benefits that were due and unpaid "for a period not to exceed two years" prior to the veteran's death. *Id.* The accrued benefits provision thus creates a narrowly limited exception to the general rule that a veteran's claim for benefits does not survive the veteran. *See Zevalkink v. Brown*, 102 F.3d 1236, 1244 (Fed. Cir. 1996) ("Thus, after a veteran's death, the claim is no longer one for disability compensation but rather one for accrued benefits."), *cert. denied*, 117 S.Ct. 2478 (1997). This statutory scheme provides a mechanism for survivors to recover certain benefits the entitlement to which has already been established or can be readily established based on evidence in the file at the date of the veteran's death.

Prior to 1997, the only statutory mechanism for challenging a final disability determination of the regional office was by an appeal to the Board. However, by regulation, a claimant could request correction of an otherwise final decision on the ground that the decision was based on a "clear and unmistakable error." That regulation, 38 C.F.R. § 3.105 (1997), could not be used to correct errors in a final decision of the Board, but was limited to correction of errors by the regional office. *See Smith v. Brown*, 35 F.3d 1516 (Fed. Cir. 1994) (holding that final decisions of the Board were not subject to CUE review under the regulation). In 1997, Congress enacted section 5109A, which provides for the correction of a "clear and unmistakable error" in a final decision of either the regional office or the Board. According to the Senate Report accompanying the committee bill that was ultimately enacted into law, the bill

> would accomplish two purposes. First, it would codify, in statute, the allowance currently specified by regulation: that the regional offices may reopen, revise, and reverse prior decisions based on a finding of "clear and [un]mistakable error." Second, the Committee bill would authorize claimants, as a matter of right, to appeal prior BVA decisions to BVA, without regard to the generally applicable 1-year limitation period, upon alleging that the appealed decision contains "clear and unmistakable error."

S. Rep. No. 105-157, at 4 (1997).

Haines argues that the 1997 enactment created a mechanism by which survivors can step into the shoes of the veteran and pursue the veteran's claims. We disagree. The statute plainly provides claimants with an opportunity to seek correction of only a limited category of erroneous decisions. However, there is nothing in the statute that provides for another person, even a survivor, to seek correction of a decision on a veteran's claim. Haines principally relies on the language of section 5109A(d) that "a [CUE] request . . . may be made at any time," asserting that "at any time" means either before or after a veteran's death, without limitation. Haines is incorrect. Subsection (d) of the statute does provide that "a request" may be made at any time. However, subsection (c), quoted above, provides that the "review may be instituted . . . upon request *of the claimant*." Thus, by the express terms of the statute, a survivor has no standing to request review of a decision affecting the disability benefits of a veteran on the ground of CUE; the survivor is not the disability benefits claimant.

Haines also argues that a CUE claim filed by a veteran survives the veteran's death because it is remedial in nature and should thus be liberally construed. In support of her argument, Haines draws an analogy between a CUE claim and the old common law writ of error, citing Supreme Court cases dating from the last century. The gist of the cases cited by Haines is that substitution of parties is generally permissible when the survivors of the deceased party pursuing a cause of action are damaged by the error in the judgment. The government responds that any similarity to the common law writ of error is inapt because veterans' benefits are statutory and there is no statutory basis for allowing survivors to pursue a veteran's CUE claim.

We agree with the government that although the CUE statute is certainly remedial, it is nonetheless unavailable to survivors concerning a veteran's disability benefits claim. As we stated in *Smith*, 35 F.3d at 1525, a party "cannot rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision." The relevant statutory provision governing survivors is section 5121. It is not section 5109A, which does not mention survivors. The language of the CUE claim provision is in sharp contrast to the accrued benefits provision, which explicitly provides for payment of certain veterans benefits to certain survivors. The absence of such language from the CUE claim provision precludes adoption of Haines's proposed interpretation. *See Brown v. Gardner*, 513 U.S. 115, 120 (1994) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally

and purposely in the disparate inclusion or exclusion."). The CUE claim provision provides nothing more than a procedure for a claimant to seek reconsideration of a limited type of error in a prior decision. It cannot be read as providing a procedure for adjudication or payment of veterans benefits to survivors. The only statutory basis providing such a remedy is section 5121.

CONCLUSION

The Court of Veterans Appeals properly determined that a veteran's CUE claim under section 5109A asserting clear and unmistakable error in a disability determination of the Secretary under Chapter 11 does not survive the veteran's death. Accordingly, the Court of Veterans Appeals dismissal of Haines's claim is

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 08/24/98

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellant(s) in favor of the Appellee(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the

party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aid shall be promptly retrieved by the party that lodged them with this court.

JAN HORBALY
Clerk

cc: Kenneth M. Carpenter
Leslie Ohta

HAINES V DVA, 98-7014
CVA-97-589

APPENDIX B

UNITED STATES COURT OF VETERANS APPEALS

No. 97-589

BARBARA HAINES, APPELLANT,

V.

HERSEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KRAMER, FARLEY, and, IVERS, *Judges*.

ORDER

On April 18, 1997, counsel for the appellant submitted a Notice of Appeal (NOA) that identified the date of the Board of Veterans' Appeals (Board or BVA) decision as December 23, 1996. On June 20, 1997, counsel for the Secretary advised the Court that no BVA decision dated December 23, 1996, existed regarding the appellant. On July 3, 1997, counsel for the appellant responded by attaching a December 23, 1996, BVA order dismissing the appeal of Victor E. Haines, the appellant's deceased husband, because of Mr. Haines' death. Counsel for the appellant asserted that she had a right to appeal the BVA's order dismissing her deceased husband's claim of clear and unmistakable error (CUE) in a prior termination of his total disability benefits. Counsel for the appellant asserted that where a cause of action is based upon a statute having a remedial purpose, for example the correction of CUE in a prior rating decision, the cause of action should be held as having survived the death of a party. Counsel for the appellant also requested that the Court accept the BVA decision attached to his response as being in compliance with Rule 4(c) of this Court's Rules of Practice and Procedure.

Although the veteran died prior to the filing of the NOA in this case, the Court has held that *Landicho v. Brown*, 7 Vet.App. 42 (1994), is controlling as far as the remedy is concerned. The Court held in Landicho that substitution of an appellant is not permissible in this Court where the appellant is a veteran who dies while the denial by the BVA of the veteran's claim for disability compensation under chapter 11 of title 38, U.S.Code, is pending here on appeal. *See Landicho*, 7 Vet.App. at 44; *Zevalkink v. Brown*, 102 F.3d 1236, 1243-44 (Fed. Cir. 1996); *Smith v. Brown*, ___ Vet.App. ___, No. 95-898, slip op. at 6-7 (June 13, 1997). It would appear that the deceased veteran's CUE claim was derived from a claim for disability compensation under chapter 11. In *Landicho*, the Court held that under such circumstances the appropriate remedy is to vacate the Board decision from which the appeal was taken and to dismiss the appeal. *Landicho*, 7 Vet.App. at 54. In this case, the BVA applied *Landicho* and dismissed the appeal for lack of jurisdiction after learning of the veteran's death. This was done to ensure that any Board decision and the underlying regional office (RO) decision(s) would have no preclusive effect in the adjudication of any accrued-benefits claims derived from the veteran's entitlements. *Id.*

The appellant attempts to distinguish the survivability of a CUE claim from "claims for accrued benefits and/or pending claims for an entitlement to benefits." Appellant's Response to Appellee's Notice, dated July 3, 1997, at 3. However, absent a claim filed by the appellant for accrued benefits or dependency and indemnity compensation, a CUE adjudication with respect to the appellant's deceased husband would not involve a case or

controversy with respect to the appellant, but rather an advisory opinion not capable of providing any relief to the appellant. The Court in *Landicho* stated:

> In *Waterhouse* [*v. Principi*], 3 Vet.App. [473,] 474-76 [(1992)], the Court made clear that it will not adjudicate hypothetical claims. Quoting from the Supreme Court's decision in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937), as to what constitutes a "controversy", the Court stated that it "must be a real and substantial controversy admitting of specific relief though a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Waterhouse*, 3 Vet.App. at 474.

Landicho, 7 Vet.App. at 49.

On consideration of the foregoing, it is

ORDERED that this appeal is DISMISSED for lack of jurisdiction.

DATED: SEP 15 1997 PER CURIAM.

APPENDIX C

EXHIBIT A

(SEAL) BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
VICTOR E. HAINES

C 6 879 379

DOCKET NO. 94-04 672) DATE DEC 23 1996
)
)

On appeal from the
Department of Veterans Affairs Regional Office
in Wichita, Kansas

THE ISSUES

1. Whether there was clear and unmistakable error (CUE) in a rating decision of March 29, 1982, terminating the veteran's total rating, based on individual unemployability, due to service-connected disabilities.

2. Entitlement to an increased rating for schizophrenia, residual type, evaluated as 50 percent disabling.

3. Entitlement to an increased rating for bilateral pes planus, evaluated as 10 percent disabling.

4. Entitlement to a total rating, based on individual unemployability, due to service-connected disabilities.

REPRESENTATION

Appellant represented by: Kenneth M. Carpenter, Attorney

ATTORNEY FOR THE BOARD

Brian J. Milmoe, Counsel

INTRODUCTION

The veteran served on active duty from August 1944 to February 1946.

This case was most recently before the Board of Veterans' Appeals (BVA or Board) in January 1996, at which time the veteran's entitlement to service connection for hypertension, secondary to service-connected schizophrenia, was denied, and issues involving clear and unmistakable error in a decision entered in March 1982 by the Department of Veterans Affairs (VA) Regional Office (RO) in Wichita, Kansas, entitlement to increased ratings for schizophrenia and pes planus, and entitlement to a total rating based on individual unemployability, due to service-connected disabilities, were remanded to the RO for further procedural and evidentiary development. BVA was notified in November 1996 of the veteran's death on October 7, 1996.

DECISION OF THE BOARD

BVA, in accordance with the provisions of 38 U.S.C.A. § 7104 (West 1991 & Supp. 1996), has reviewed and considered all of the evidence and material of record in the veteran's claims file(s). Based on its review of the relevant evidence in this matter, and for the following reasons and bases, it is the decision of BVA that dismissal of the issues on appeal is warranted.

FINDINGS OF FACT

1. Received by BVA on November 22, 1996, was notice from the RO that the veteran had died on October 7, 1996.

2. At the time BVA was notified of the veteran's death, this appeal was under active consideration on the merits by a Member or a panel of Members of the Board.

CONCLUSION OF LAW

Because of the death of the veteran during active consideration of the merits of the veteran's appeal, BVA lacks jurisdiction to enter a decision on the merits of the appellate issues presented. 38 U.S.C.A. § 7104(a) (West 1991 & Supp. 1996); 38 C.F.R. § 20.1302 (1995).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

As a matter of law, veterans' claims do not survive their deaths. *Vda de Landicho v. Brown*, 7 Vet.App. 42, 47 (1994). Unfortunately, the veteran died during the pendency of the appeal and the claims advanced by him are now moot. Inasmuch as this appeal was under active consideration on the merits at the time of the veteran's death and at the time BVA was advised thereof, BVA is without jurisdiction of the certified issues and must dismiss the appeal. 38 C.F.R. § 20.1302 (1995).

In reaching this determination, BVA intimates no opinion as to the merits of this appeal or to any derivative claim brought by any survivor of the veteran. 38 C.F.R. § 20.1105 (1995). It is observed that the death certificate indicates that the veteran was married at the time of his

death and that he was survived by his spouse. A surviving spouse is a qualified survivor to carry on, to the limited extent provided for by law, a deceased veteran's claim for VA benefits, by submitting an application for accrued benefits within one year after the veteran's death. 38 U.S.C.A. § 5121 (West 1991).

ORDER

The appeal is dismissed.

/s/ Bruce Kannee
BRUCE KANNEE
Member, Board of Veterans' Appeals

The Board of Veterans' Appeals Administrative Procedures Improvement Act, Pub. L. No. 103-271, § 6, 108 Stat. 740, 741 (1994), permits a proceeding instituted before the Board to be assigned to an individual member of the Board for a determination. This proceeding has been assigned to an individual member of the Board.

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C.A. § 7266 (West 1991 & Supp. 1995), a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision, provided that a Notice of Disagreement concerning an issue which was before the Board was filed with the agency of original jurisdiction on or after November 18, 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). The date which appears on the face of this decision constitutes the date of mailing and

the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals.